(14)

No. 04-1324

CLERK

IN THE

Supreme Court of the United States

PATRICK A. DAY,
Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CIVIL PROCEDURE AND FEDERAL COURTS PROFESSORS JANET COOPER ALEXANDER, BARBARA ALLEN BABCOCK, SHERI ENGELKEN, RICHARD FREER, TYLER T. OCHOA, MALLA POLLACK, LAUREN ROBEL, SUZANNA SHERRY, MICHAEL SOLIMINE, A. BENJAMIN SPENCER, ADAM N. STEINMAN, AND GEORGENE VAIRO SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the State waives a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Whether Habeas Rule 4 permits a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

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INTEREST OF *AMICI CURIAE*

This case concerns whether, in a habeas corpus case, a court may raise an affirmative defense—that the statute of limitations has expired—*sua sponte* after the State has filed

its answer. *Amici curiae* are law professors in the area of civil procedure and federal courts.[1] As scholars and commentators in the field, *amici* have a unique perspective on the application of the Federal Rules of Civil Procedure and related rules, as well as a strong interest in ensuring their consistent and evenhanded interpretation.

Janet Cooper Alexander is the Frederick I. Richman Professor of Law at Stanford Law School. Professor Alexander teaches in the areas of advanced civil procedure, complex litigation, conflict and dispute resolution, and federal courts. She has published important articles on class actions and securities and has also delivered several speeches on procedural issues.

Barbara Allen Babcock is the Judge John Crown Professor of Law, *Emerita*, at Stanford Law School. Professor Babcock's areas of expertise include civil procedure, criminal procedure, and women's legal history. She served as Assistant Attorney General in the Civil Division of the Department of Justice from 1977-1979. She is the coauthor of Babock and Massaro, *Civil Procedure: Cases and Problems* (2d ed. 2001).

Sheri Engelken is an Assistant Professor at Gonzaga University School of Law. She teaches in the areas of civil procedure, constitutional law, intellectual property, and professional responsibility. She was a federal court litigator for nineteen years before entering academia. She has delivered speeches and presentations on numerous federal practice issues.

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

Richard Freer is the Dean of Faculty and the Robert Howell Hall Professor of Law at Emory Law School. He focuses on civil procedure and complex litigation. Professor Freer is the coauthor of a popular civil procedure casebook and has written two volumes of the treatise *Moore's Federal Practice*. He has also written several widely cited articles in the area of civil procedure.

Tyler T. Ochoa is a Professor of Law at Santa Clara University School of Law. Professor Ochoa has taught classes in the areas of pleadings and civil procedure. Professor Ochoa has published several law review articles, including an article on the purpose of statutes of limitations.

Malla Pollack is a Professor of Law at the American Justice School of Law. She is currently visiting at the University of Idaho Law School. Professor Pollack specializes in the area of public domain. She has published numerous articles in that area, as well as in a wide variety of other areas. She has taught multiple subjects including federal courts and constitutional law.

Lauren Robel is the Dean and the Van Nolan Professor of Law at Indiana University School of Law, where her teaching focuses on both civil procedure and federal courts. Dean Robel has published several books and other scholarly works on civil litigation. She has served for over ten years as a member of the Rules Committee of the Indiana Supreme Court, and as a member of the Rules Committee for the United States District Court for the Southern District of Indiana. Dean Robel has also served as a member of the Advisory Committee on Circuit Rules for the United States Court of Appeals for the Seventh Circuit.

Suzanna Sherry is the Cal Turner Professor of Law and Leadership at Vanderbilt Law School. Professor Sherry has taught civil procedure, constitutional law, constitutional history, constitutional theory, federal courts, and first amendment law. Her work in the area of constitutional law

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A. Benjamin Spencer is an Assistant Professor of Law at the University of Richmond School of Law. Professor Spencer has taught classes in civil procedure, administrative law, complex litigation, and a seminar in advanced issues of civil procedure. Professor Spencer has written several articles and a book titled *Acing Civil Procedure: A Checklist Approach to Solving Procedural Problems* (2005).

Adam N. Steinman is an Assistant Professor of Law at the University of Cincinnati College of Law. Professor Steinman's areas of expertise include civil procedure, federal jurisdiction, federal practice and procedure, and appellate practice and procedure. He has published articles in the areas of civil procedure and habeas corpus. Professor Steinman has also given presentations on the subjects of habeas corpus and civil procedure.

Georgene Vairo is a Professor at Loyola Law School in Los Angeles. She has published numerous articles in the area of civil procedure, including multiple articles on the Federal Rules of Civil Procedure. She is also the author of several chapters of *Moore's Federal Practice* and serves on the Board of Editors of that publication.

SUMMARY OF ARGUMENT

I. This case concerns a fundamental question in our system of justice: the circumstances under which a court

may, *sua sponte*, raise an affirmative defense that the defendant itself has not raised. Because our system of justice is adversarial, the parties to a case ordinarily have the burden of pressing their positions—claims and defenses—within the adjudicatory framework established by the Federal Rules of Civil Procedure. The courts, by contrast, play the detached role of neutral arbiter. Consequently, a party's failure to assert an affirmative defense ordinarily results in its waiver or forfeiture. It is not the role of the courts to litigate the case on behalf of one party or another by raising claims or defenses the party itself has omitted, much less issues that, as here, the party conceded. Indeed, the judge who does so risks assuming the role—or appearing to have assumed the role—of advocate, threatening the appearance of neutrality that is critical to public faith in the judiciary.

II. In limited circumstances, courts may assert otherwise waived defenses (or raise otherwise waived claims) *sua sponte*. But those circumstances are wholly absent here.

A. First, courts may raise defenses *sua sponte* where Congress has, by statute, obligated them to do so. But Congress did not impose such a departure from the ordinary allocation of responsibilities between courts and parties for the statute of limitations defense at issue in this case. To the contrary, to the extent the habeas rules contemplate a limited departure from the ordinary, party-driven, adversarial approach—for example, by requiring judges to review a complaint for adequacy in the first instance—the habeas rules expressly limit that departure to the period *before* answer. Here, the district court sought to raise an issue favoring the State *after* answer.

B. In addition, courts may (and sometimes must) raise omitted defenses if they implicate values that transcend the concerns of the parties. For example, courts may always raise subject-matter jurisdiction *sua sponte* (as the Federal Rules of Civil Procedure make clear), as it implicates

separation of powers concerns independent of the parties' interests. Statutes of limitations, by contrast, generally do not implicate concerns beyond the interests of the parties. Ubiquitous in the law, they generally provide a right of repose that inheres in the defendant—not in the judicial system or non-parties. As a result, they are subject to waiver or assertion at the defendant's discretion. There is no compelling reason to depart from that ordinary rule here.

ARGUMENT

There are few principles more familiar in litigation than the rule that failure to raise a claim or non-jurisdictional defense—like the statute of limitations defense at issue here—results in its forfeiture or waiver. That principle is inherent in our adversary system of justice, which relies on the parties rather than the courts to frame the issues. It is embedded in the Federal Rules of Civil Procedure. And it is a feature of the procedural rules of virtually every State. The universality of the rule is hardly surprising. When judges unnecessarily assume the burden of raising arguments and defenses for parties that have not raised those matters themselves, judges do not merely displace our adversary system with one that is more inquisitorial in nature. They also risk assuming or appearing to assume the role of advocate, compromising the appearance of judicial neutrality that is at the heart of our judicial system and a source of public confidence therein.

Nothing in the Rules Governing Section 2254 Cases (the "Habeas Rules") suggests that Congress intended to weaken the ordinary rules of waiver when addressing the statute of limitations for habeas cases. To the contrary, the text of the habeas rules reinforces the applicability of ordinary waiver rules. Although Congress expressly altered the rules of waiver and forfeiture for some issues (such as exhaustion), it did not modify those rules for the statute of

limitations. And to the extent Congress departed from the adversarial model by requiring judges to screen habeas petitions for plain defects in the first instance, Congress carefully circumscribed that departure by limiting it to the period before answer. Finally, none of the ordinary exceptions to the general principles of waiver or forfeiture apply here.

I. COURTS ORDINARILY SHOULD NOT RAISE, *SUA SPONTE*, NON-JURISDICTIONAL STATUTE-OF-LIMITATIONS DEFENSES

A. The Failure To Raise An Affirmative Defense Usually Waives That Defense

The principles of waiver and forfeiture resonate throughout our system of justice. Because our adversary system relies on the parties—not the courts—to frame the issues and present their claims and defenses, it has long been the rule that the failure to press a claim or defense results in its forfeiture. See, *e.g.*, *Geyer's Lessee* v. *Irwin*, 4 U.S. 107, 107 (1790) (the failure of the defendant and his attorney to "suggest[] the privilege, as an objection to the trial of the cause," "amounts to a waiver, by which the party is forever concluded"); *Yeaton* v. *Lynn*, 30 U.S. (5 Pet.) 224, 232 (1831) ("[T]he revocation * * * not having been pleaded, could not be given in evidence"). This Court has, "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver." *New York* v. *Hill*, 528 U.S. 110, 114 (2000).

Statute-of-limitations defenses in particular have long been subject to waiver. Over a century ago, this Court expressly recognized that a limitations period ordinarily "does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions." *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); see also, Note, *Traer* v. *Clews*, 115 U.S. 528, 542 (1885) ("The statute of

limitations, as a defense to an action, must be pleaded, or it will be considered waived by the defendant. * * * In absence of [a] statutory provision to the contrary, where parties to a suit fail at the proper time to interpose the defense of bar by the statute of limitations, it cannot be afterwards made available.").

Reflecting those principles, the Federal Rules of Civil Procedure expressly require defendants to plead their affirmative defenses—and statutes of limitations in particular. Rule 8(b) provides that each "party shall state in short and plain terms the party's defenses to each claim asserted." Fed. R. Civ. P. 8(b). Reinforcing that requirement, Rule 8(c)—entitled "Affirmative Defenses"—specifies that certain defenses "shall [be] set forth affirmatively" by the party, including the defenses of "statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c).

Rule 12(b), in turn, makes it clear that the *answer* must include every defense (except seven enumerated defenses such as failure to state a claim, improper venue, and lack of jurisdiction, which may be made by motion). "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto." Fed. R. Civ. P. 12(b). This Court ordinarily accepts "the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" *Christensen* v. *Harris County*, 529 U.S. 576, 583 (2000). Affirmative defenses thus must be set forth as required by Rules 8(b), 8(c) and 12(b)—or they may not be asserted at all. As Wright and Miller observes, "it is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense." 5 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 1278, at 644-645 (3d ed. 2004).

The same rule finds "virtually universal acceptance" in the procedural requirements of the States as well. See, *e.g.*, *Patrick* v. *Tuscaloosa County Comm'n*, 816 So. 2d 46, 51 (Ala. Civ. App. 2001) (A "statute of limitations is an affirmative defense * * * ; generally, an affirmative defense that is not pleaded when the answer is filed is deemed to have been waived."); *Uyleman* v. *D.S. Rentco*, 981 P.2d 1081, 1083 (Ariz. Ct. App. 1999) ("[T]he statute of limitations is an affirmative defense that is waived unless raised."); *Zertuche* v. *Montgomery, Ward & Co., Inc.*, 706 P.2d 424, 426 (Colo. Ct. App. 1985) ("The statute of limitations is an affirmative defense which is waived unless affirmatively pleaded."); *Lobrillo* v. *Brokken*, 837 So. 2d 1059, 1060-1061 (Fla. Dist. Ct. App. 2002) (trial court erred in considering limitations defense where defendant did not raise it because the "[s]tatute of limitations is an affirmative defense that must be specifically pled in the answer"); *Cole* v. *State*, 15 P.3d 820, 823 (Idaho 2000) ("[T]he statute of limitations is an affirmative defense that may be waived if it is not pleaded by the defendant."); *Porter* v. *Good Eavespouting*, 505 N.W.2d 178, 182 (Iowa 1993) ("Defendants have a duty to plead the statute of limitations if they wish to rely on it."); *Alexander* v. *Womack*, 857 So. 2d 59, 62 (Miss. 2003) ("[T]he statute of limitations is an affirmative defense which must be pled. If a party intends to rely on [it], he must affirmatively plead it * * * ."); *Maria's Healthcare Servs., Inc.* v. *Turenne*, 28 P.3d 491, 494 (Mont. 2001) ("A statute of limitations defense is an affirmative defense that is waived if it is not raised in the answer to a claim."); *Manker* v. *Manker*, 644 N.W.2d 522, 531 (Neb. 2002) ("The statute of limitations is an affirmative defense which is waived if not asserted by demurrer or answer."); *In re Interest of K.B.*, 490 N.W.2d 715, 717 (N.D. 1992) ("[A] statute of limitations in a civil proceeding is an affirmative

defense. Affirmative defenses are waived if not pleaded."); *State ex rel. Jones* v. *Suster*, 701 N.E.2d 1002, 1007–1008 (Ohio 1998) ("A statute of limitations is an affirmative defense that is waived unless pled in a timely manner."); *Furr* v. *Thomas*, 817 P.2d 1268, 1272–1273 (Okla. 1991) ("[S]tatutes of limitation must be pled as an affirmative defense. Failure to plead an affirmative defense operates as a waiver of that defense."); *Bowden* v. *Gofax, Inc.*, 776 A.2d 1066, 1066–1067 (R.I. 2001) ("The failure to plead the affirmative defense of statute of limitations results in its waiver."); *In re Estate of Peters*, 765 A.2d 468, 473–474 (Vt. 2000) ("Failure to plead statute of limitations as an affirmative defense in an answer or appropriate motion means that it is waived."); *Jones* v. *Jones*, 457 S.E.2d 365, 369 (Va. 1995) (failure to raise statute of limitations as an affirmative defense in a responsive pleading results in waiver); *Haywood* v. *Aranda*, 19 P.3d 406, 410 n.8 (Wash. 2001) (failure to raise statute of limitations in accordance with Civil Rule 8(c) results in waiver); *Kofler* v. *Florence*, 573 N.W.2d 568, 571 (Wis. Ct. App. 1997) ("It is well-settled law that the affirmative defense of statute of limitations must be raised * * * or be deemed waived.").[2]

[2] See also *Custer* v. *Plan Comm'n of City of Garrett*, 699 N.E.2d 793, 795 (Ind. Ct. App. 1998) ("Indiana Trial Rule 8(C) provides that '[a] responsive pleading shall set forth affirmatively and carry the burden of proving * * * statute of limitations * * *.' It is generally true that an affirmative defense is waived by failure to raise it in the pleadings."); *O'Donnell* v. *Fletcher*, 681 P.2d 1074, 1076 (Kan. Ct. App. 1984) ("Since defendant failed to appear or plead the statute as a defense, the statute of limitations was waived."); *Bagwell* v. *Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 316 (Md. Ct. Spec. App. 1995) ("[T]he statute of limitations is an affirmative defense that must be included in the answer."); *Blue Spruce Co.* v. *Parent*, 365 A.2d 797, 801 (Me. 1976) (affirmative defense waived if not pleaded); *Rhee* v. *Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. Ct. App. 2000) (similar); *Coastal Oil New England, Inc.* v. *Citizens Fuels Corp.*, 644 N.E.2d 258, 260 n.3 (Mass. App. Ct. 1995) ("A party is required to plead the affirmative defense of statute of limitations in its answer."); *Saffian* v. *Simmons*, 704 N.W.2d 722, 726 (Mich. Ct. App. 2005) ("A statute of limitations defense must be raised in a defendant's first responsive pleading or in a motion filed before that pleading."); *State, Univ. & Cmty. Coll. Sys.* v. *Sutton*, 103 P.3d 8, 18 (Nev. 2004) (similar); *Berry* v. *Meadows*, 713 P.2d 1017, 1024 (N.M. Ct. App. 1986) (similar); *Fade* v. *Pugliani/Fade*, 779 N.Y.S.2d 568, 570 (N.Y. App. Div. 2004) (similar); *Robinson* v. *Powell*, 500 S.E.2d 714, 717 (N.C. 1998) (similar); *Wolff* v. *Sec'y of the S.D. Game, Fish and Parks Dep't*, 544 N.W.2d 531, 533–534 (S.D. 1996) ("Under SDCL 15-6-8(c), a party's pleadings must affirmatively set forth matters constituting an avoidance or affirmative defense. If such an affirmative defense is not pleaded, it is waived."); *In re B.A.C.*, 144 S.W.3d 8, 12 (Tex. Ct. App. 2004) (similar); *Brown & Root Indus. Servs.* v. *Indus. Comm'n of Utah*, 947 P.2d 671, 677 (Utah 1997) ("Statute of limitations defenses are affirmative defenses and are waived unless properly raised.").

B. Courts Should Depart From Our Adversarial Model By Raising Waived Issues *Sua Sponte* Only In Very Limited Circumstances

The nearly universal rule that affirmative defenses (like statutes of limitations) are waived unless pleaded reflects the adversarial nature of our system of justice. "The rule that points of law not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Two features set our system of adversarial justice apart from the inquisitorial model: (1) the parties are the masters of the litigation, and (2) the judge is a more neutral and passive actor. Stephan Landsman, *The Adversary System* 1 (American Enterprise Institute 1984); see also Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to do Justice*, 26 Harv. J.L. & Pub. Pol'y 175, 176 (2003). As this Court has observed, our "system [is] adversarial rather than inquisitorial" because it includes

"a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con *adduced by the parties*." *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 n.2 (1991) (emphasis added).[3]

The adversarial model—party-driven litigation with a neutral judge—serves important interests. It is, in the first instance, more likely to achieve correct and just results. "Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). In fact, the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975). It is also efficient, because it places the burden of identifying the issues on the parties, who not only outnumber the judges,

[3] See also *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). The concept of party-driven dispute resolution, of course, predates our civilized system of justice. In the middle ages, when disputes were resolved by trial by battle, trial by ordeal, or wager of law, the parties to the controversy were charged with representing and defending their own interests. Landsman, *supra*, at 2–4. Generally, trial by battle required disputing parties to physically battle until one of the sides yielded; trial by ordeal required that a litigant carry out an ordeal; and wager of law required that one of the litigants swear an oath that his claims were true as well as produce other persons to support his oath or to make their own oaths. *Id.* at 8–9. A common feature of these medieval methods was that the parties to the dispute, rather than the judge, played the most important role in determining the outcome. *Id.* at 10.

but also have the strongest incentive to identify and press their best contentions. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look At Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 247–248 (2002) ("The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system.").

Making the parties rather than the courts responsible for identifying and pressing the issues is also critical to the legitimacy of the judicial process. Increasing party involvement and control contributes to the parties' willingness to accept the court's decision and to consider it fair, even if it is contrary to their interests. Landsman, *supra*, at 44–45. More fundamentally, requiring the parties to identify the arguments that favor their position preserves both the fact and appearance of *judicial neutrality*. One of the hallmarks of the adversarial system is that it removes judges from the fray. Relieved of the obligation to identify arguments or advocate for either party—each of which has its own advocate—the judge adopts a more detached role, deciding the matter solely "on the basis of facts and arguments pro and con adduced by the parties." *McNeil*, 501 U.S. at 181 n.2. The adversarial system thus avoids the risk of subtle bias that can result when the judge is required to press the matter forward himself. See Kirsten Debarba, *Maintaining the Adversarial System*, 55 Vand. L. Rev. 1521, 1528 (2002) (citing 1 Wayne R. LaFave, *Criminal Procedure* § 1.4(c) (2d ed. 1999)). Critically, it also preserves the *appearance* of impartiality that is essential to the legitimacy of the judicial branch. *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality."); *Liteky* v. *United States*, 510 U.S. 540, 557 (1994) (Kennedy, J., concurring) ("one of the very

objectives of law is the impartiality of its judges in fact and appearance").

Allowing judges to raise non-jurisdictional defenses *sua sponte* can undermine the adversary system and the important values it serves. When judges unnecessarily raise issues *sua sponte*, they risk invading the role of the advocate and drawing their own neutrality and impartiality into question. Particularly from the perspective of the losing party, the judge who reaches out *sua sponte* to raise a dispositive defense—a defense the party's own lawyers have not raised themselves or, as here, actually conceded—will often appear to have assumed the role of surrogate counsel for the other side. The appearance of partisanship is aggravated further still when the judge, by raising the issue and ruling on it after the time for its assertion has lapsed, effectively relieves the opposing side of the consequences of a waiver. It rarely will appear "fair" for a judge to assist one side but not the other in advocating its case. Such unfairness is particularly problematic in the habeas context because raising defenses *sua sponte* will almost invariably favor one side, the State. Thus, when courts raise affirmative defenses *sua sponte*, they place themselves in the "untenable position of ferreting out possible defenses" the parties have not addressed and come "dangerously close to acting as advocates for the state rather than as impartial magistrates." *Smith* v. *Horn*, 120 F.3d 400, 409 (3d Cir. 1997).

That is precisely the appearance that arose here. The trial court in the first instance unmistakably assisted the State in its defense by raising an issue—the timeliness of the habeas petition—the State had not only failed to raise, but had *conceded* in its answer. Pet. App. 6–7. Having raised the issue *sua sponte*, the trial court then aggravated the resulting appearance of partiality by excusing not only the State's waiver, but also the concession of timeliness contained in its answer. There is no small irony here that

petitioner's putatively untimely assertion of his claim is being held against him precisely because the State's failure to assert a defense at all—much less in a timely fashion—is being forgiven. It is regrettably commonplace today to hear litigants complain that the judge was biased in favor of the other side. The sort of *sua sponte* raising of issues and relief from waiver that occurred in this case unnecessarily fuel such perceptions.

That is not to say that there are *no* circumstances in which courts may raise issues *sua sponte* and relieve a party of the consequences of waiver. To the contrary, as explained below, courts may raise issues and overlook waivers where, for example, (a) Congress has by statute or implication directed them to do so, or (b) the issues transcend the narrow interests of the parties. Those exceptions are wholly inapplicable here.

II. NOTHING IN THIS CASE JUSTIFIES LOOSENING THE ORDINARY SYSTEM OF ADVERSARY PRESENTATION OR THE RULES OF WAIVER APPLICABLE TO LIMITATIONS DEFENSES

The doctrines of waiver and forfeiture, of course, are not immutable principles. They may, under certain circumstances, be displaced by statute or modified if the interests at stake transcend those of the parties before the court. In those circumstances, courts may undertake to address issues the parties themselves have not raised. But neither of those exceptions apply here.

A. The Federal Habeas Statute And Habeas Rules Do Not Support Departure From The Traditional Rule That Unasserted Limitations Defenses Are Waived

1. "It is well-settled that habeas corpus is a civil proceeding." *Browder* v. *Director, Dep't of Corrs.*, 434 U.S. 257, 269 (1978); see, *e.g.*, *Banks* v. *Dretke*, 540 U.S. 668, 704–705 (2004) (holding that Federal Rule of Civil Procedure

15(b) applies in habeas cases). Rule 11 of the Habeas Rules authorizes federal courts to apply the ordinary Federal Rules of Civil Procedure in habeas cases: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Implementing the authority granted by Habeas Rule 11, Federal Rule of Civil Procedure 81(a)(2) declares that the Federal Rules "are applicable to proceedings * * * [of] habeas corpus * * * to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions." Fed. R. Civ. P. 81(a)(2).

There thus can be little doubt that the principles of waiver and forfeiture generally apply in habeas cases. This Court has, "'in the context of a broad array of constitutional and statutory provisions,' articulated a general rule that presumes the availability of waiver." *Hill*, 528 U.S. at 114. There is no reason to except habeas from that general rule, and no historical basis for doing so. To the contrary, this Court has unhesitatingly applied the doctrine of waiver in habeas proceedings. See, *e.g.*, *Gray* v. *Netherland*, 518 U.S. 152, 165–166 (1996) ("procedural default is an affirmative defense" the State must "raise * * * or lose the right to assert"); *Schiro* v. *Farley*, 510 U.S. 222, 228–229 (1994) (State "can waive" the prohibition on "retroactive application of new rules" by "not raising it"). And there is especially good reason to apply the doctrine here. As explained above, the Federal Rules of Civil Procedure, which incorporate the principle of waiver, are "applicable as a general matter to habeas cases." *Slack* v. *McDaniel*, 529 U.S. 473, 479 (2000).

Nothing in the text or history of 28 U.S.C. § 2254 counsels departure from that approach. To the extent

Congress intends to protect against the waiver of a right "that intention" often "will be deducible from [the] text or legislative history." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) ("If Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history"). Here, there is no evidence that Congress intended to defeat the ordinary rule of waiver for statute of limitations purposes.

The evidence, in fact, is to the contrary. Where Congress intended departure from the ordinary rules of waiver for habeas petitions, it said so expressly. For example, when addressing exhaustion of state remedies, Congress provided that "[a] state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, *expressly waives* the requirement." 28 U.S.C. § 2254(b)(1)(A) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States* v. *Rusello*, 464 U.S. 16, 23 (1983). Congress clearly knew how to provide for departure from the traditional rules of waiver. That Congress textually provided for such a departure for the issue of exhaustion but not for the statute of limitations in Section 2254 speaks volumes about Congress's intent. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (the heightened pleading requirement for specific issues under Federal Rule of Civil Procedure 9 implies the exclusion of that requirement for other issues).

2. Nonetheless, several courts (including the decision below) have read Habeas Rule 4 to justify wholesale de-

parture from the ordinary rules that the parties are responsible for raising affirmative defenses, and that defenses not raised are deemed waived. Pet. App. 5a. But Habeas Rule 4 provides a highly circumscribed departure from those principles, for screening purposes only. That exception cannot be expanded beyond its text to the circumstances here.

Entitled "Preliminary Consideration by Judge," Habeas Rule 4 provided in relevant part:

> The original petition shall be * * * examined *promptly* by the judge to whom it is assigned. If it *plainly appears* from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal * * * . *Otherwise* the judge shall order respondent to file an answer * * * .

Habeas Rule 4 (emphasis added).[4]

As its text and title make clear, Rule 4 merely establishes a limited preliminary screening period that terminates when the State files an answer. "[P]romptly" after the petition is filed, the judge must conduct a preliminary review and dismiss the petition if it "plainly appears" to be without merit. But the word "otherwise" makes it clear that the process of *sua sponte* review ends once the judge requires an answer. Webster's dictionary defines "otherwise" as meaning "in different circumstances" or "under other conditions." *Webster's Third New International Unabridged Dictionary* (3d ed. 1971). Simply put, Rule 4 contemplates an initial gatekeeper screen by the district court through which it determines whether there is a plain defect that requires *sua sponte* dismissal. If the trial court

[4] Habeas Rule 4 has since been amended. The changes were "intended to be stylistic" and not "substantive" with the exception of changes to the notification provisions. Advisory Committee Notes to Habeas Rule 4.

fails to dismiss the petition—in other words, if the "otherwise" condition is met—the trial court orders an answer and the period for *sua sponte* screening comes to an end.

Rule 4's direction that a petition be presented and examined "promptly by the judge to whom it is assigned" likewise indicates an intent to limit the judge's power to summarily dismiss a petition to the period before an answer has been filed. It is a "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States* v. *Nordic Village*, 503 U.S. 30, 36 (1992). The use of "promptly" in Rule 4 emphasizes the premium placed on the expeditious dismissal of marginal petitions. That emphasis is at odds with a prolonged authority of *sua sponte* dismissal that lasts throughout the course of the habeas proceedings. It would be odd, indeed, for Congress to have required the district court to screen cases "promptly" in the initial stages of habeas litigation, and to order an answer absent dismissal, if Congress had intended district courts to examine the petition for defects *sua sponte* over the entire course of litigation.

Departures from the common law and prior practices, moreover, are to be strictly construed. *Shaw* v. *R.R. Co.*, 101 U.S. 557, 564 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."); *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("[It] is a well-established principle of statutory construction that '[t]he common law * * * ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose'"). The traditional rule in our adversary system is that the *parties* must raise their affirmative defenses, and that courts ought not invade the advocates' role by raising

such defenses (and relieving parties from the consequences of waiver) *sua sponte*. Rule 4 contains a single, narrow exception to this rule, permitting the district court to dismiss claims *sua sponte* during an initial screening period before the answer is filed if it "plainly appears from the face of the petition" that relief is not warranted. Particularly given the rule that departures from traditional practices are strictly construed, Rule 4's narrow exception during an initial screening period cannot be read as a wholesale license for judges to assume the advocate's role by raising new defenses *sua sponte after* an answer has been filed.

3. Perhaps recognizing the absence of a textual basis for post-answer *sua sponte* dismissals based on a waived limitations defense, at least one court has invoked the "purpose[s]" of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), such as "comity," "federalism," and protecting the "finality" of convictions. *United States* v. *Bendolph*, 409 F.3d 155, 162 (3d Cir. 2005) (en banc). But Congress does not enact purposes. It enacts statutes. When Congress amended the federal habeas statutes through the AEDPA, it drew a balance between the salutary purposes of "the Great Writ"—ensuring that individuals are not incarcerated in violation of their federal rights—and the potentially deleterious effects of collateral attacks on the interests of federalism, comity, and finality. That balance includes specific provisions modifying the rules of waiver applicable to, for example, failure to exhaust. But Congress did not modify the rules applicable to the statute of limitations. The balance under AEDPA, by virtue of the Habeas Rules, also includes a requirement that the district courts perform an initial screening function before answer, during which the courts may dismiss a petition *sua sponte* if it "plainly" lacks merit. But that departure from our ordinarily adversarial system of justice was carefully circumstanced to confine it to a "prompt" review prior to the answer. To assert that the AEDPA's "purposes"

justify further departures from the ordinary rules—departures found nowhere in statutory text—would rewrite the AEDPA and the Habeas Rules under the guise of construing them.

That effort, moreover, would effectively require the federal courts to read otherwise applicable Federal Rules of Civil Procedure differently for habeas cases and other civil cases. Rules 8 and 12 are unmistakable in their import: Statute of limitations defenses must be asserted by answer or be waived. To impose a *different* rule for habeas cases alone would be unfaithful to the spirit of the Rules and the interest in uniform application. See Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What did the Drafters Intend?*, 21 Suffolk U. L. Rev. 351, 356-357 (1987) ("The dominant intellectual and operational force" moving the Advisory Committee for the Federal Rules was the belief "that procedure should be entirely separate from substance"). There simply cannot be two different interpretations of Rules 8 and 12 with respect to statutes of limitations—one for most civil cases, under which statute-of-limitations defenses would be waived if not raised by answer, and another for habeas cases, under which the statute-of-limitations defense would be available for assertion by the State or the court *sua sponte* throughout the case, even after the State waives (or, as here, concedes) the issue. A single rule cannot mean two different things at once. *Clark* v. *Martinez*, 125 S. Ct. 716, 722–723 (2005).

Such an approach, moreover, would sow inappropriate confusion into the law—confusion that uniform rules of civil procedure are designed to prevent. There are myriad rights and causes of action that implicate a variety of values that might be invoked by a court to justify differential application of the federal rules. But courts are not and should not be in the business of re-examining procedural rules on a case by case basis in view of the rights or cause of

action being asserted. Uniform interpretation of the federal rules creates efficiency. It relieves claimants of the need to navigate arcane procedural requirements unique to the cause of action they assert. And it ensures predictability. Interpreting procedural requirements so they vary from case to case and cause of action to cause of action undermines those values. A better way to sow confusion, uncertainty, and litigation is hard to imagine.

B. The Defenses That Traditionally Can Be Raised *Sua Sponte* Are Fundamentally Different From The Statute-Of-Limitations Defense At Issue Here

While adversary presentation is the ordinary rule in litigation, there is a limited category of claims that courts can (and sometimes must) raise *sua sponte*—those that "implicate[] values that may transcend the concerns of the parties." *Brown* v. *Fauver*, 819 F.2d 395, 398 (3d Cir. 1987). Thus, a federal court may inquire into its own subject-matter jurisdiction at any time, and failure to raise the issue early in litigation does not result in its waiver. That is true because subject-matter jurisdiction is not solely or even predominantly a matter of concern to the parties. To the contrary, because subject-matter jurisdiction reflects "a restriction on federal power," it is a matter of great concern to the Congress and the courts. *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Consequently, "no action of the parties"—neither waiver nor consent—"can confer subject-matter jurisdiction upon a federal court"; only Congress can confer jurisdiction. *Ibid.*

In *Granberry* v. *Greer*, 481 U.S. 129 (1987), this Court applied similar principles to conclude that, in habeas cases, district courts may dismiss claims *sua sponte* where the claimant has failed to exhaust state remedies. The requirement of exhaustion has since been expressly incorporated into the habeas statute as a prohibition on

federal court relief. Federal courts, Section 2254 now declares, "shall not" grant a writ of habeas "unless it appears that * * * the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Like subject-matter jurisdiction, the requirement of exhaustion serves interests beyond those of the parties. It serves the interests of federal and state *courts* by minimizing potential conflicts between them, offering state courts the opportunity to address the claims before federal interference is threatened. *Rose* v. *Lundy*, 455 U.S. 509, 515 (1982). By requiring a habeas petitioner to exhaust his state court remedies, federal courts "defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.* at 518. The doctrine of exhaustion "protect[s] *the state courts'* role in the enforcement of federal law and prevent[s] disruption of state judicial proceedings." *Ibid.* (emphasis added). Finally, it protects federal judicial resources. Sometimes state courts will grant relief and, even when they do not, they often will develop a complete factual record. *Id.* at 519. Moreover, nothing in the exhaustion requirement forecloses the claimant from eventually receiving federal review of his claims.[5]

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[5] Some courts of appeals have suggested in *dicta* that *forum non conveniens* can be raised *sua sponte*. See, *e.g.*, *Bendolph*, 409 F.3d at 164 n.14; *Corporacion Mexicana de Servicios Maritimos* v. *M/T Respect*, 89 F.3d 650, 656 n.1 (9th Cir. 1996). To the extent those decisions are correct, they rest on the view that, in addition to protecting the interests of the parties, *forum non conveniens* serves the interests of witnesses and the courts, which need to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43–44 (1991); see also *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 454 n.4 (1994) ("[*F*]*orum non conveniens* is not a substantive right of the

The statute of limitations at issue in this case stands on an entirely different footing. Ubiquitous in the law, statutes of limitations generally provide a right of repose that vests in the individual. Unlike subject-matter jurisdiction or exhaustion of state remedies, statutes of limitations are designed primarily to protect those before the court, not to serve the interests of non-parties, protect structural interests, or prevent conflict between two judicial systems with otherwise concurrent jurisdiction. Indeed, limitations periods operate like quintessentially private rights. Parties regularly enter into private tolling agreements that have the effect of altering limitations periods. Such private agreements between the litigants, however, would be wholly ineffective to create subject-matter jurisdiction.

Moreover, subject-matter jurisdiction and exhaustion of remedies are not specifically listed in Rule 8(c) as matters that must be raised in an answer. Although *res judicata* is an affirmative defense listed in Rule 8, this Court has stated that *res judicata* "might be appropriate" for *sua sponte*

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parties, but a procedural rule of the forum."). Although the parties benefit from a case being heard in the proper court, in that they receive a fairer and more efficient trial, it may be the judicial system that is the ultimate beneficiary, because the courts are able to provide what is expected of them. The factors considered by a court when deciding whether to dismiss on *forum non conveniens* grounds illustrate this point. Courts consider "the relative ease of access to sources of proof; the availability of compulsory process for attendance of * * * witnesses; * * * and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947). Public concerns are a factor when litigation is not brought at its origin, such as burdening courts with administrative duties and the community with jury duty. *Id.* at 508–509. At the same time, because of the implications of essentially rejecting a plaintiff's choice of forum, dismissal on *forum non conveniens* grounds "must be exercised with restraint and discretion." *Chambers*, 501 U.S. at 44.

assertion "in special circumstances." *Arizona* v. *California*, 530 U.S. 392, 412 (2000). That would be true, however, only to the extent that the policy underlying *res judicata* is "not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Ibid.* (internal quotation marks omitted). Like the other defenses that may be raised *sua sponte*, *res judicata* may be raised by a court on its own initiative only insofar as it protects interests beyond the parties, including the judiciary's interest in avoiding waste.

The concern about "judicial waste" that might support *sua sponte* assertion of *res judicata*, however, does not apply in the habeas context. Waste is the relitigation of an issue where that issue *never was intended* to be litigated a second time. Federal habeas, by contrast, contemplates and necessarily involves the relitigation of issues already resolved in state court. Allowing that relitigation to occur later (after an unasserted limitations period expires) rather than earlier does not "waste" judicial resources. It merely allows the relitigation that Congress intended to permit at some point in time. In any event, even in the context of *res judicata*, "[w]here no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication." *Id.* at 412–413. Because statutes of limitations predominantly protect parties, not judicial interests, courts should not merely be cautious "about raising [those bars] *sua sponte*." Instead, they should avoid raising limitations issues *sua sponte* altogether and thereby avoid "eroding the principle of party presentation so basic to our system of adjudication" and critical to the appearance of judicial neutrality.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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